Arizona Public Service Company and International Brotherhood of Electrical Workers, AFL-CIO, Local 387. Case 28-CA-6600

December 3, 1981

## **DECISION AND ORDER**

# By Members Fanning, Jenkins, and Zimmerman

Upon a charge filed on August 17, 1981, by International Brotherhood of Electrical Workers, AFL-CIO, Local 387, herein called the Union, and duly served on Arizona Public Service Company, herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 28, issued a complaint on September 1, 1981, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that, since June 25, 1981, following a Board Decision and Order, and at all times thereafter, Respondent has refused, and continues to date to refuse, to recognize and to bargain collectively with the Union as the exclusive bargaining representative of Respondent's Palo Verde, Arizona, nuclear power plant production and maintenance employees in the appropriate unit, although the Union has requested and is requesting it to do so. On September 14, 1981, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On September 22, 1981, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on September 30, 1981, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response to the Notice To Show Cause.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its answer to the complaint, Respondent admits that the existing systemwide unit of certain of its production and maintenance employees constitutes a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act, and that the Union is the designated exclusive representative of its production and maintenance employees as set forth in successive collective-bargaining agreements. Respondent, however, stresses that these agreements do not include the Palo Verde production and maintenance employees, and denies that the Palo Verde employees may be part of the systemwide bargaining unit without first having an opportunity to vote in a self-determination election as to whether they wish to be included in that unit or to remain unrepresented.

In the Motion for Summary Judgment, the General Counsel argues that Respondent's answer attempts to relitigate issues that were raised and determined by the Board in the underlying representation cases. We agree with the General Counsel.

The record, including the record in the underlying representation cases, Cases 28-RM-394 and 28-UC-111, shows that, in December 1980, Respondent filed an RM petition seeking an election among its production and maintenance employees at its Palo Verde nuclear power plant, and that the Union filed a UC petition seeking a clarification of the existing systemwide production and maintenance unit to include the Palo Verde employees as an accretion to the systemwide unit. Following transfer of the cases to the Board by the Regional Director, on June 5, 1981, the Board issued a Decision and Order<sup>3</sup> in which it found that Respondent's Palo Verde production and maintenance employees were an accretion to the existing systemwide bargaining unit represented by the Union. The Board found that no question concerning representation of the Palo Verde employees existed, and therefore dismissed the petition in Case 28-RM-394.

On June 15, 1981, Respondent filed with the Board a motion for reconsideration of the Board's Decision and Order. On June 19, 1981, the Board issued an unpublished Order denying Respondent's motion. On July 1, 1981, Respondent filed with the

<sup>1 256</sup> NLRB 400 (1981).

<sup>&</sup>lt;sup>2</sup> Official notice is taken of the record in the representation proceeding, Cases 28-RM-394 and 28-UC-111, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See LTV Electrosystems, Inc., 166 NLRB 938 (1967), enfd. 388 F.2d 683 (4th Cir. 1968); Golden Age Beverage Co., 167 NLRB 151 (1967), enfd. 415 F.2d 26 (5th Cir. 1969); Intertype Co. v. Penello, 269 F.Supp. 573 (D.C.Va. 1967); Follett Corp., 164 NLRB 378 (1967), enfd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

<sup>3 256</sup> NLRB 400.

Board a renewed motion for reconsideration of the Board's Decision and Order. On July 9, 1981, the Board issued an unpublished Order denying Respondent's renewed motion.

On June 24 and July 13, 1981, the Union requested Respondent to recognize it as the exclusive representative of the Palo Verde production and maintenance employees and to bargain collectively regarding those employees' rates of pay, wages, hours of employment, and other terms and conditions of employment. Respondent, by letters dated June 25 and July 20, 1981, refused to recognize and to bargain with the Union, and has continued to refuse to recognize and to bargain with the Union as the exclusive bargaining representative of its Palo Verde employees. Respondent asserts as reasons for its continued refusal to recognize and to bargain with the Union that the Board ignored acts which make the application of the accretion doctrine inappropriate in this case, that the Palo Verde employees constitute a new and distinct grouping, and that Board law requires that such employees be granted a self-determination election as to whether they wish to be represented by the Union or remain unrepresented—arguments previously presented to and considered by the Board. Thus, it appears that Respondent is attempting to raise in this proceeding issues which were raised and determined in the underlying representation cases.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.<sup>4</sup>

All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

#### FINDINGS OF FACT

#### 1. THE BUSINESS OF RESPONDENT

Respondent, an Arizona corporation, is engaged as a public utility in the generation, transmission, distribution, and sale of electricity and natural gas. During the past 12-month period, which period is representative of its operations generally, Respondent, in the course and conduct of its business operations, derived gross revenues in excess of \$250,000, and during the same period of time purchased goods and materials valued in excess of \$50,000 which were transported in interstate commerce and delivered to its operations in the State of Arizona directly from suppliers located in States of the United States other than the State of Arizona.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

#### II. THE LABOR ORGANIZATION INVOLVED

International Brotherhood of Electrical Workers, AFL-CIO, Local 387, is a labor organization within the meaning of Section 2(5) of the Act.

#### III. THE UNFAIR LABOR PRACTICES

## A. The Representation Proceeding

#### 1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

All production and maintenance employees employed by Respondent throughout Respondent's systemwide operations.

#### 2. The recognition

At all times material herein, the Union has been the designated exclusive collective-bargaining representative of Respondent's employees in the unit described above, and has been recognized as such by Respondent. Such recognition has been embodied in successive collective-bargaining agreements, the most recent of which is effective by its terms from April 1, 1980, to April 1, 1982.

## 3. The Board's Decision and Order

On June 5, 1981, the Board issued a Decision and Order,<sup>5</sup> finding, inter alia, that certain produc-

<sup>&</sup>lt;sup>4</sup> See Pittsburgh Plate Glass Co. v. N.L.R.B., 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

<sup>5 256</sup> NLRB 400.

tion and maintenance employees employed by Respondent at its Palo Verde, Arizona, nuclear power plant, which is currently in the process of being constructed, are an accretion to, and included in, the unit described above.

## B. The Request To Bargain and Respondent's Refusal

Commencing on or about June 24, 1981, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about June 25, 1981, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that Respondent has, since June 25, 1981, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

## IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

### V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit and, if an understanding is reached, embody such understanding in a signed agreement.

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

## CONCLUSIONS OF LAW

1. Arizona Public Service Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

- 2. International Brotherhood of Electrical Workers, AFL-CIO, Local 387, is a labor organization within the meaning of Section 2(5) of the Act.
- 3. All production and maintenance employees employed by Respondent throughout Respondent's systemwide operations constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.
- 4. At all times material herein, the above-named labor organization has been and now is the designated exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.
- 5. By refusing on or about June 25, 1981, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.
- 6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.
- 7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

### **ORDER**

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Arizona Public Service Company, Palo Verde, Arizona, its officers, agents, successors, and assigns, shall:

- 1. Cease and desist from:
- (a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with International Brotherhood of Electrical Workers, AFL-CIO, Local 387, as the exclusive bargaining representative of its employees in the following appropriate unit:
  - All production and maintenance employees employed by Respondent throughout Respondent's systemwide operations.
- (b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

- 2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:
- (a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.
- (b) Post at its Palo Verde, Arizona, facility copies of the attached notice marked "Appendix." Copies of said notice, on forms provided by the Regional Director for Region 28, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.
- (c) Notify the Regional Director for Region 28, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

#### **APPENDIX**

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with International Brotherhood of Electrical Workers, AFL-CIO, Local 387, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All production and maintenance employees employed by us throughout our systemwide operations.

ARIZONA PUBLIC SERVICE COMPANY

<sup>&</sup>lt;sup>4</sup> In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."